No. 3382

United States

Circuit Court of Appeals

For the Ninth Circuit.

NORTHERN IDAHO AND MONTANA POWER COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. L. JORDAN LUMBER COMPANY, a Corporation,

Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Montana.

BRIEF OF DEFENDANT IN ERROR.

HENRY C. SMITH,
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J. E. ERICKSON,
Attorneys for Defendant in Error.

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Brief for Defendant in Error.

The facts which gave rise to this case are fairly stated in the brief of the plaintiff in error and need not here be repeated. The case was tried to the Court, a jury having been waived by both parties, and resulted in a judgment for the plaintiff, defendant in error here, for the sum of $34,500 and costs. The plaintiff in error challenges the judgment and has brought the case to this Court on a writ of error for review.

Adopting the suggestion of counsel in their brief, we will call the defendant in error the "Mill Company" and the plaintiff in error the "Power Company."

While the Power Company has made numerous assignments of error, counsel evidently rely upon the

insufficiency of the evidence to sustain the judgment, they say in their brief:

> "While this writ challenges certain facts of the Court for the reason that the same are not sustained by the evidence, it is mainly based on the assignment that on the facts found by the Court supplemented by the undisputed evidence, the judgment should have been for the Defendant in the District Court."

The Court returned a written opinion which is found in the record (Transcript, p. 146). Aside from the opinion no special findings were made although the opinion refers to and discusses the facts upon which the order of judgment is made. In this entire record there is not, so far as we have discovered, a single exception to the admission or exclusion of testimony; at the conclusion of the case no motion was made by the Power Company for judgment on the ground that the Mill Company had failed to make a case against the Power Company. The question of the sufficiency of evidence was never raised and no attempt was ever made to obtain a ruling of the District Court on this question: no effort was made to point out or suggest to the Court wherein the testimony was insufficient to support a judgment for the Mill Company. Counsel are raising the question for the first time in this Court; they are asking the Court to review this record for the purpose of weighing the evidence and deciding whether or not the testimony as presented at the trial of the case was sufficient to support the findings of the trial court. The question

now presents itself will this Court, upon this writ, examine the record for the purpose of ascertaining the credibility of the witnesses, the weight to be given to the testimony and what the evidence does establish or does not establish? We understand the rule to be, except in cases where the sufficiency of evidence has been appropriately challenged and excepted to in the District Court, this Court will not go into these questions.

Section 700, R. S., provides:

> When an issue of fact in any civil cause in a Circuit Court is tried and determined by the Court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the Court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.

Corpus Juris, Volume 3, page 841 states the rule as follows:

> In the federal courts, "when an action at law is tried before a jury, their verdict is not subject to review unless there is absence of substantial evidence to sustain it, and even then it is not reviewable unless a request has been made for a peremptory instruction, and an exception taken to the ruling of the Court." "When a jury is

> waived, and the cause is tried by the Court, the general finding of the Court, for one or the other of the parties stands as the verdict of a jury, and may not be reviewed in an appellate court unless the lack of evidence to sustain the finding has been suggested by a request for judgment, or some motion to present to the Court the issue of law so involved, before the close of the trial."

Numerous authorities are cited to sustain this rule, in fact there seems to be no exception to its application.

Consolidated Coal Company of St. Louis v. Polar Wave Ice Company is a case decided in the Circuit Court of Appeals of the Eighth District and reported in 45 C. C. A. page 639, decision by Thayer, Circuit Judge, the opinion in that case is in part as follows:

> This action was brought by the Consolidated Coal Company of St. Louis, the plaintiff in error, to recover a balance in the sum of $6,759.63, which was alleged to be due to it from the Polar Wave Ice Company, the defendant in error for a certain quantity of coal said to have been sold and delivered to the defendant in error. The defendant below denied that it was indebted to the plaintiff as alleged in its complaint, and pleaded several defenses to the cause of action, which need not be stated in detail. The parties to the cause subsequently filed a stipulation waiving a jury, and consenting to try the issue joined before the Court. The case was so tried, resulting in a judgment in favor of the defendant

against the plaintiff below in the sum of $5,016.82, the defendant below having by its answer interposed several counterclaims, which the trial court held to be well founded. Although the trial judge rendered a written opinion in the case, which if found in the record, but does not form a part of the bill of exceptions, he did not make a special finding of facts, but contented himself with a general finding. This Court has repeatedly held that when the finding is general, no questions are open for review on a writ of error, except such as may have been raised in the progress of the trial by exceptions taken to the admission or exclusion of evidence. It has also held that it will not treat an opinion of the trial court as a special finding of facts, which was obviously not intended as such, although the opinion may state certain of the facts where were developed at the trial. When a case is tried before the court, counsel cannot raise questions of law which will be reviewed on appeal as may be done when a case is tried to a jury. If the exceptions taken during the progress of the trial relative to the admission or exclusion of evidence do not present all of the questions of law which counsel desire to have reviewed, they should make a seasonable application to the trial court to have the facts found specially, which the court in its discretion may do, and incorporate the finding in a bill of exceptions. When such a finding is made and duly incorporated in a bill of exceptions, an appellate court is then in a position to

determine whether the facts as found warranted the judgment. But under no circumstances will this court examine the record with a view of ascertaining what the testimony establish or did not establish, except in that class of cases at the conclusion of all the evidence a request is preferred to direct a verdict for the defendant upon the ground that there is no substantial evidence to support a judgment against the .defendant. These propositions are so well established that a reference to a few only of the adjudged cases is all that is deemed necessary. Searcy Co. v. Thompson, 27 U. S. App. 715, 13 C. C. A. 349, 66 Fed. 92; Adkins v. W. & J. Sloane, 19 U. S. App. 573, 8 C. C. A. 656, 60 Fed. 344; Bowden v. Burnham, 19 U. S. App. 448, 8 C. C. A. 248, 59 Fed. 752; Trust Co. v. Wood, 19 U. S. App. 567, 8 C. C. A. 658, 60 Fed. 346; Insurance Co. v. Folsom, 18 Wall. 237, 253, 21 L. Ed. 827; Stanley v. Board, 121 U. S. 535, 547, 7 Sup. Ct. 1234, 30 L. Ed. 1000; Lehnen v. Dickson, 148 U. S. 71, 73, 13 Sup. Ct. 481, 37 L. Ed. 373.

In the case of Gibson v. Luther reported in Volume 116 C. C. A. page 35, the Court speaking through Adams, Circuit Judge, says:

"The bill of exceptions contains an opinion of the trial judge in which he discusses at some length the facts and law of the case, and counsel have assigned for error what they claim to have been the holdings, findings, and judgments of the court as reflected in that opinion.

"But this will not avail them. Errors are assignable in actions at law on rulings made or points of law decided and not on reasons given therefor. The opinion, even though it finds and comments on some of the evidential facts of the case in support of the conclusion reached, is not a special finding of facts within the meaning of the statute. But, if the opinion could be treated as a special finding of facts, it would not help the parties to this suit.

"The findings as made must stand if there was any substantial evidence to sustain them; and whether there was such evidence could be made reviewable on writ of error, only by presenting a request to the trial court either to make some declaration that there was no such evidence, and upon refusal by the court so to do, taking proper exception and assigning error thereon. There having been no request in this case for any such declaration of law in any form the finding of facts, even if it was such, cannot be challenged. Felker v. First National Bank of Cincinnati, just decided by this court and cases therein cited."

It seems that the rule as stated in the foregoing case is particularly applicable to the case at bar. There, as here, the trial Judge rendered a written opinion, commented upon and analyzed the facts in the case in support of the conclusion reached. The Court held that such an opinion could not be regarded as a special finding, but even if the opinion could be treated as a special finding of facts it would not help

the appellants, for the reason that the trial judge had been given no opportunity to pass upon the question of the sufficiency of the evidence.

See, also, case of Felker v. First National Bank, 116 C. C. A., page 32, where the Court holds:

> The next error assigned is that "the Court erred in finding that the plaintiff had purchased said drafts and was the owner thereof," and we are asked to review the evidence taken before the Court on that issue and reverse its finding. This we cannot do. When a jury is waived and a special finding of facts made by the trial Court, an appellate court cannot review the evidence to ascertain its preponderance on one side or the other. The findings as made must stand if there was any substantial evidence to sustain them.

The Pennsylvania Casualty Co. v. Whiteway et al., reported in 127 C. C. A., page 332 was a case tried before the Court without a jury and resulted in a verdict for defendants in error in the sum of $5,000. The verdict was challenged as not being sustained by the evidence and the action was brought to this Court on a writ of error. Gilbert, Circuit Judge speaking for the Court says in the opinion:

> "The burden of the argument of counsel for the plaintiff in error is that of the evidence overwhelmingly established the fact that Irwin was not a steel man, as he was classified in the policy, and as alleged in the complaint, but was a common laborer, and it ignores the effect of the judgment of the court below, which must be taken as

conclusively establishing the contrary, for there was no motion in the court below for a ruling or judgment on that question at the close of the trial, nor does any assignment of error challenge the finding of the Court on the evidence. When an action at law is tried before a jury, their verdict is not subject to review unless there is absence of substantial evidence to sustain it, and even then it is not reviewable unless a request has been made for a peremptory instruction, and an exception taken to the ruling of the Court. When a jury is waived, and the cause is tried by the Court, the general finding of the Court for one or the other of the parties stands as the verdict of a jury, and may not be reviewed in an appellate court unless the lack of evidence to sustain the finding has been suggested by a request for a ruling thereon, or a motion for judgment, or some motion to present to the Court the issue of law so involved, before the close of the trial. There was no such request or motion made in the case in hand, and the judgment of the court below is therefore conclusive of the facts determined thereby. (Citing: Marginson v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; Wilson v. Merchants' Loan & Trust Co., 183 U. S. 121, 22 Sup. Ct. 55, 46 L. Ed. 112; Boardman v. Toffey, 177 U. S. 271, 6 Sup. Ct. 734, 29 L. Ed. 898; Barnard v. Randle, 110 Fed. 906, 49 C. C. A. 177; United States Fidelity & G. Co. v. Board of Commrs., 145 Fed. 144, 76 C. C. A. 114; Felker v. First Nat. Bank, 196 Fed. 200, 116 C.

C. A. 32; Bell v. Union Pac. R. Co., 194 Fed. 366, 114 C. C. A. 326.)"

We might continue to cite many more authorities to sustain the position, that there is nothing in this case for the Court to consider, but we think enough has been called to the attention of the Court to fortify our position.

If we assume, for the sake of argument, that this record is in such condition that the Court might properly review the evidence, then, we would invoke the general and well known rule that prevails in both Federal and State Courts, that findings of fact of a trial court based on conflicting evidence will not be disturbed on appeal. This rule has been adhered to by the Supreme Court of Montana (the State where this case was tried) from the organization of the Court to the present time. This rule was first recognized in the case of Ming v. Truett, first Montana, page 327, where the Court says:

> "The Court below, upon the trial, gave judgment for respondent. This Court must presume that the Court as the contrary does not appear upon the record, found facts sufficient to warrant the judgment. In other words, this Court must presume, as the contrary does not appear, that the Court below found that appellant did not receive these fees as probate judge, and as fees allowed him by law for performing the duties of his trust. This being found, $4 per lot of these fees were undoubtedly illegal, and the demanding and receiving of them, under our statute, was extortion.

"The testimony presented in the record is conflicting upon this point; and although it may appear to us that the weight of evidence was against the conclusion arrived at, the well-settled principles of law will not allow us, in such cases, to interfere.

"The Court below observes the witnesses, their character, their manner and the probabilities of their evidence, and is intrusted with the delicate and often difficult task of giving such weight to the testimony of each one as seems to him just and proper; and it must be considered by us that, in so regarding the evidence in the Court below, in this case it was found that the weight of evidence was in favor of the respondent."

The latest expression of that Court is found in the case of Matoole v. Sullivan, 55th Mont. 363, where the Court says:

"Where a verdict, based upon evidence in substantial conflict has the approval of the district court as shown by its denial of a new trial, the Supreme Court will not interfere even though the evidence as appearing in the record, seems to preponderate in favor of the appellant."

The first of these cases above cited was decided in 1871 and the last case was decided in 1918 and in all the time that has intervened between these decisions the Court has not varied in its position on this rule.

In the Circuit Court of Appeals this rule has received judicial sanction in cases too numerous to cite. In the case of Buckeye Powder Company v. Du Pont

Powder Company reported in the 139 C. C. A., page 319, the evidence as to the facts involved in the case was conflicting and the Court uses this strong and positive language:

> "We need not dwell upon the point that we have no power to determine (as we are asked to do) whether the verdict was in accord with the weight of the evidence, or to review the finding of the jury on any disputed fact. Our only business is to inquire whether the assignments of error that were properly taken disclose any material mistake in the trial. For this reason much of the plaintiff's argument must be laid aside as irrelevant; indeed, the brief contains so much that is nothing more than a conscious or unconscious attack on the verdict that we have not always found it easy to disentangle the questions of law that lie within our province from the question of fact that lie outside."

In Bowden v. Burnham, 8th C. C. A., page 250, we find the following language by Caldwell, Circuit Judge:

> "The record purports to contain all the evidence, and it is said in the brief filed on behalf of the plaintiffs in error that this Court can review the decision of the lower Court upon the evidence, and most of the briefs of counsel on both sides are taken up with the discussion of the evidence in the case. But, upon the record before us, we cannot look into the evidence. When a case is tried by the Court without a jury, a gen-

eral finding of the Court has the same effect as the verdict of a jury, and is conclusive in this Court as to the facts. Such a finding cannot be reviewed in this Court by a bill of exceptions, or in any other manner. It prevents all inquiry in this Court into the special facts and conclusions of law upon which the finding rests. Norris v. Jackson, 9 Wall. 125; Miller v. Insurance Co., 12 Wall. 285, 297; Insurance Co. v. Folsom, 18 Wall. 237; Martinson v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321; Boardman v. Toffey, 117 U. S. 271, 6 Sup. Ct. 734; Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481.

In Bursch v. Strongberg Carlson Co., 133 C. C. A., page 246, the Court takes the position that "The decisions of a Court in the trial of an action at law without a jury upon the weight of conflicting evidence are not reviewable in the National Courts." Citing Gibson v. Luther, 116 C. C. A., page 35.

The Supreme Court of California in Union Collection Company v. Rogers, 122 Pac., page 980 goes so far as to hold (quoting syllabi) "a finding supported by the positive testimony of one witness, which testimony is disputed by the adverse party, will not be disturbed although the reviewing Court would have made a different finding."

It was the peculiar province of the trial court to weigh conflicting testimony and to judge the credibility of the witnesses. He had the opportunity to observe the intelligence of the witnesses, and their interest, if any, in the result of the case; their conduct

or demeanor while testifying and their general demeanor on the witness stand; their means of observation and knowledge concerning the matters about which they testified and all the matters, facts, and circumstances shown in the trial bearing upon the weight to be given to their testimony. With all the evidence and circumstances fresh in his mind the learned trial court made his findings. From the opinion set out in the record on page 146, we gather that the Court found:

> 1. "Trial to Court, the Court finds for the plaintiff and against the defendant, and for damages in the amount of $34,500.
>
> 2. That the fire was caused by the electric current is demonstrated to a reasonable probability by a PREPONDERANCE OF THE EVIDENCE.
>
> 3. Contributory negligence is not pleaded and it does not appear.
>
> 4. The probabilities are two to one in favor of the theory that the (lightning) arrester operating with one ground in the mill, as it would, is the cause of the fire and is the proved negligence charged by the plaintiff against the defendant."

The finding of the trial Court, whether general or special, has the same effect as the verdict of a jury (Revised Statutes, section 649; U. S. Compiled Statutes 1918, section 1587).

The conclusion seems to be irresistible, therefore, that this judgment may not now be successfully attacked for two reasons, (1) because of the failure of

the Power Company, properly and timely, to challenge the sufficiency of the evidence and the conclusion reached by the trial judge in the court below, and, (2) because the record discloses the fact that the judgment is based on substantial evidence, although it may appear that in some instances, the testimony in the case was conflicting.

The Power Company's brief is occupied, almost entirely, by a discussion of the evidence. If in view of the foregoing, the Court should by any chance, consider such a discussion, at this stage of the action, we submit that there is substantial evidence to sustain the decision of the Court that the fire was of electrical origin and that no contributory negligence on the part of the Mill Company was shown. The Power Company sets forth in its brief in its statement of facts, on page 6, the following:

> "This inspector, Mr. Mills, condemned the whole system and ordered that it be taken out at an early date. The conduit system which the inspector had ordered installed had been mainly put in, but not completed at the time of the fire. (R., p. 49.) The conduits in which the light wires ran had no metallic ground."

It is to be noted that this system which was condemned by the fire insurance inspector was the system which was installed in 1910 by the Power Company. (See Transcript, p. 27.) The work done by Stiles for the Mill Company had all been accepted by the insurance inspector. (See Transcript, p. 48.)

"Mr. Mills was the electrician for the insurance underwriters, he had no connection with the Northern Idaho and Montana Power Company, and as I didn't claim to be an expert electrician and wasn't taking the whole responsibility on my own shoulders and AS FAR AS THE WORK HAD BEEN DONE, IT WAS REPORTED SATISFACTORY TO THE BOARD OF UNDERWRITERS."

The only unsatisfactory work, then, in the mill was the wiring which had previously been done by the Power Company. They contend, (p. 6 of the Brief of Plaintiff in Error) the conduits in which the light wires ran had no metallic ground, and attribute to us, negligence on that account, and contend that this negligence is shown by our own testimony. The testimony of the expert in the employ of the Power Company was to the effect that unless the neutral were grounded at the transformer, in the event of a breakdown at the transformer, the grounding of the conduit would create a fire hazard rather than the contrary, because of the arcing between the secondary of lighting wires, and the conduit itself. This would create an intense heat which would probably fuse the conduit and start the fire.

(See Testimony of Clingerman, Transcript, pp. 132, 133.)

"Now if that conduit was grounded there would be no arc formed between the conduit and the ground; that would not eliminate the arcing between these wires and the conduit, but the fire

hazard would not still exist as Mr. Kimmel states. If your ground exists on this side, this accidental ground and you have a good working grounding of the neutral outside of the mill which was admittedly not present in this case, your circuit would be complete between these two grounds, rather than running through the mill and arcing. IF YOUR NEUTRAL WERE GROUNDED BOTH THE ARC OUTSIDE AND INSIDE THE CONDUIT WOULD HAVE BEEN ELIMINATED IF THE PRIMARY AND SECONDARY WIRES WERE IN CONTACT."

It then becomes clear that there was no negligence in failing to ground the conduits when the neutral was not grounded. This undoubtedly accounts for the favorable report on Mr. Stiles' work as above stated.

We submit that no contributory negligence was pleaded, that no contributory negligence was shown by the testimony, whence none can be shown on the part of the plaintiff in error.

"Contributory negligence should be pleaded with the same degree of particularity as the acts of negligence relied upon in the complaint, but where it is not, and the trial proceeds without objection, upon the theory that it has been properly pleaded, it is too late to raise the question on appeal. Nelson v. City of Helena, 16 Mont. 21, 39 Pac. 905; Harrington v. Butte A. & P. Ry. Co., 37 Mont. 169, 16 L. R. A., N. S., 395, 95 Pac.

8; Coulter v. Union Laundry, 34 Mont. 590, 87 Pac. 973; Longpre v. Big Blackfoot Min. Co., 38 Mont. 99, 99 Pac. 131; Gleason v. Missouri River Power Co., 42 Mont. 238, 112 Pac. 394; Molt v. Northern Pac. Ry. Co., 44 Mont. 471, 120 Pac. 809.

"Contributory negligence must, as a rule, be alleged, unless it appears from the plaintiff's case. Hunter v. Montana Central Ry. Co., 22 Mont. 525, 57 Pac. 140.

"Contributory negligence must be pleaded. Orient Ins. Co. v. Northern Pac. R. Co., 31 Mont. 502, 78 Pac. 1036.

"Contributory negligence must be pleaded with the same degree of particularity as the plaintiff must plead negligence. Longpre v. Big Blackfoot Min. Co., 38 Mont. 99, 99 Pac. 131; Gleason v. Missouri River Power Co., 42 Mont. 238, 112 Pac. 394; Molt v. Northern Pac. Ry. Co., 44 Mont. 471, 120 Pac. 809.

"In an action for damages for injury of person, the plea of contributory negligence on the part of the plaintiff is a special defense which must be pleaded in defendant's answer. State ex rel. Montana Central Ry. Co. v. District Court of Eighth Judicial District, 32 Mont. 37, 79 Pac. 546."

The learned District Judge has mentioned in his comments that there is no evidence of a leak through the transformer between the primary and secondary windings. If the Court is to permit a reconsidera-

tion of the facts of this case it should bear in mind that the transformers were removed from the iron case before they were tested, that the insulator was burned on the outside at the points where it could come in contact with the transformer case, and that the wires were bare and the leads were bare in places, that the porcelain insulators between the leads and the case was broken.

Testimony of Arthur Mosby:

> "These leads were still on and we were careful, however, to keep the leads separated, because if they came together it would be short, this porcelain being gone. Of course I had no means of testing this transformer in the condition that it was when first found." (Transcript, p. 108.)
> "These leads here were all broken, this porcelain, I think, on both of them, and these leads were all bent together, so we took these leads and straightened them up and after he made a test he had me take all these leads and shellac them. I didn't do any winding on these coils."

Testimony of A. L. Jordan:

> "When I saw this transformer on fire oil was bubbling out and burning. The transformer was about 48 feet from the building, the wind was blowing from that direction. They could not get within 20 feet of the transformer."

It is a strange fact that the oil inside of a metal jacket was burning, bubbling up out of the inside of the transformer and that at the same time the mill was burning, and on a cold night with flames 20 feet

away from this paraffin oil. It is to be remembered, in connection with this that the lightning-arrester was defective, furnishing the circuit through the mill by way of the ground up the lightning-arrester to the primary through the defective leads and iron jacket to the secondary and then through the arc formed in the mill to the ground.

See testimony of Fred Utter:

"The porcelain was broken on one of the transformers. One of them had been afire around the transformer and the insulation was somewhat carbonized on the outside. A carbonized insulator might offer a path of conductivity to an electric current under a very high potential. I do not believe that the carbon would cause a short under two thousand volts. I noticed that one of the coils had been afire." (Transcript, p. 39.)

See, also, Transcript, page 86.

A. "I wouldn't hardly think it possible for the heat from the mill to do it. While it might set the pole afire right next to the transformer, I don't think it would set the transformer afire. There was an iron jacket around it, you know. I am not sure whether burned off. I don't believe it did but I believe some braces burned off and the poles fell down. I have assumed that Mr. Jordan saw this transformer burning and have probably taken that into account somewhat in attributing the fire to electrical causes. And supposing Mr. Jordan saw this transformer burning, I should say that the cause of the burn-

ing of the transformer was a breakdown inside of the transformer. I would say that would be the most probable cause and that breakdown would be attributable to a puncture of the insulating material, or of the lead wires which would be the same thing. It would be the inside of the transformer apparatus that the breakdown occurred, and I have taken that into account in assuming the cause of the fire."

See, also, Transcript, page 63.

Q. "I will ask you to take into consideration all of the testimony you have heard in this case, assuming that you have heard it all,—and I think you have,—and tell us if you are able to your own satisfaction to form an opinion as to what caused that fire?"

A. "Yes, sir, I am. An electric arc in the mill is my opinion of that."

Q. "Do you recall the testimony to that effect that the transformer itself was burning on the inside?"

A. "Yes."

Q. "What importance do you attach to that, if any?"

A. "Well, that in my mind would lead me to believe that there was a connection between the primary and the secondary in that transformer and undoubtedly that there was an arc in the transformer and that it was in the same circuit as the other arc was."

We submit there was evidence of a leak through the transformer.

Respectfully submitted,

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